Supreme Court, U.S.
FILED
NOV 17 1995
OFFICE OF THE CLERK

No. 95-636

In the
Supreme Court of the United States
October Term, 1995

MARGO NEFF, For Herself and
Those Similarly Situated,

Petitioner,

vs.

AMERICAN DAIRY QUEEN CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

William L. Killion
Counsel of Record
Troy A. Bader
GRAY, PLANT, MOOTY,
MOOTY & BENNETT,
P.A.
3400 City Center
33 South Sixth Street
Minneapolis, MN 55402
(612) 343-2800

Joseph M. Harrison IV
HAYNES AND BOONE,
L.L.P.
112 East Pecan Street
Suite 1600
San Antonio, Texas 78205
(210) 978-7000

Attorneys for Respondent

1995 – Bachman Legal Printing ■ (612) 339-9518 ■ FAX (612) 337-8053

30 pp

QUESTION PRESENTED

Whether the Court of Appeals for the Fifth Circuit erred in affirming summary judgment on the basis that American Dairy Queen Corporation is not the "operator" of the two Dairy Queen ® stores in question for purposes of Title III of the Americans with Disabilities Act.

PARTIES

The parties in this case are:

Petitioner: Margo Neff

Respondent: American Dairy Queen Corporation

American Dairy Queen Corporation's affiliates include its parent corporation, International Dairy Queen, Inc., a Delaware corporation. American Dairy Queen Corporation is a wholly-owned subsidiary of International Dairy Queen, Inc. American Dairy Queen Corporation's affiliates also include the following International Dairy Queen, Inc. subsidiaries:

Orange Julius of America, a California corporation;

Karmelkorn Shoppes, Inc., a Delaware corporation;

Golden Skillet, Inc., a Delaware corporation;

DQF, Inc., a Minnesota corporation;

Firstaff, Inc., a Minnesota corporation;

Dairy Queen Canada, Inc., a federal Canadian corporation; and

Orange Julius Canada Limited, a federal Canadian corporation.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 2

STATUTORY AND REGULATORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

I. Course Of Proceedings Below. 4

II. Statement Of Facts. 6

A. Margo Neff. 6

B. American Dairy Queen Corporation. 6

C. R & S Dairy Queens, Inc. And The San Antonio Stores. 8

REASONS FOR DENYING THE WRIT 9

I. The Fifth Circuit Properly Held That The Issue Of Whether ADQ Is An "Operator" Of The San Antonio Stores Is A Question Of Law In The Instant Action. 9

II. The Fifth Circuit's Decision Does Not Conflict With Any Decisions Of Other United States Courts Of Appeal 10

A. The Fifth Circuit's Decision Does Not Conflict With The Third Circuit's Decision In *Drexel*... 11

B. The Fifth Circuit's Decision Does Not Conflict With Eighth And Tenth Circuit Decisions Concerning Civil Rights Act Remedies..... 12

CONCLUSION..... 15

TABLE OF AUTHORITIES

CASES

Alonzo v. Bayside Restaurant Co., C.A. No. C-94-103, slip op. at 4 (S.D. Tex. 1994) 5, 8

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) 9

Bradley v. Pizzaco of Nebraska, Inc., 7 F.3d 795 (8th Cir. 1993) 12

Drexel v. Union Prescription Ctrs., Inc., 582 F.2d 781 (3rd Cir. 1978) 11, 12

Evans v. McDonalds Corp., 936 F.2d 1087 (10th Cir. 1991) 14

Kennedy v. McDonalds Corp., 610 F. Supp. 203 (D. W.Va. 1985) 14

Neff v. American Dairy Queen, 879 F. Supp. 57 (W.D. Tex. 1994) 2, 5

Neff v. American Dairy Queen, 58 F.3d 1063 (5th Cir. 1995) ..... passim

Wheeler v. Hurdman, 825 F.2d 257 (10th Cir. 1987) 12

Young v. American Dairy Queen, Inc., 1994 WL 761233 (N.D. Tex. 1994) 5

No. 95-636

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

MARGO NEFF, For Herself and
Those Similarly Situated,

Petitioner,

-vs.-

AMERICAN DAIRY QUEEN
CORPORATION

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent American Dairy Queen Corporation ("ADQ") respectfully requests that this Court deny Petitioner's request for a writ of certiorari to the Fifth Circuit Court of Appeals in this action. There are no compelling reasons for this Court to

grant Petitioner's request for writ of certiorari. The Fifth Circuit properly affirmed the District Court's grant of summary judgment holding that, as a matter of law, the provisions of the franchise agreement alone could not form the basis for a finding that ADQ was an "operator" of the two franchised Dairy Queen® restaurants at issue in this case for the purposes of the Americans with Disabilities Act's ("ADA" or "the Act") prohibition on discrimination in public accommodations. Moreover, the Fifth Circuit's decision does not conflict with any decisions of other United States Courts of Appeal or any decisions of this Court. Accordingly, this Court should deny Petitioner's request for writ of certiorari to the Fifth Circuit Court of Appeals.

OPINIONS BELOW

The opinion of the District Court for the Western District of Texas granting ADQ's motion for summary judgment in this matter is reported at 879 F. Supp. 57 (W.D. Tex. 1994), and reprinted in the Appendix of Petitioner's Brief, (A-1 - A-10). The opinion of the Fifth Circuit Court of Appeals affirming the district court's grant of summary judgment in favor of ADQ is reported at 58 F.3d 1063 (5th Cir. 1995), and reprinted in the Appendix of Petitioner's Brief, (A-11 - A-30).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant portions of section 302 of the Americans With Disabilities Act:

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of

any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

42 U.S.C. § 12182(a).

For the purposes of subsection (a) of this section, discrimination includes -

> (iv) a failure to remove architectural barriers, and communication barriers that are structural in nature . . . where such removal is readily achievable[.]

42 U.S.C. § 12182(b)(2)(A)(iv).

Relevant portions of section 301 of the Americans with Disabilities Act:

The following private entities are considered public accommodations for purposes of this subchapter, if the operations of such entities affect commerce -

* * *

> (B) a restaurant, bar, or other establishment serving food or drink[.]

42 U.S.C. § 12181(7)(B).

STATEMENT OF THE CASE

I. Course Of Proceedings Below.

On February 24, 1994, Petitioner Margo Neff ('Neff'), through Advocacy Incorporated, commenced this action against ADQ in the District Court of Bexar County, Texas, alleging that ADQ had violated the Americans With Disabilities Act. Neff alleged that ADQ violated the Act because it failed to remove architectural barriers in order to allow disabled individuals access to Dairy Queen® store buildings located at 13122 Nacogdoches and 9726 Perrin Beitel in San Antonio, Texas (the 'San Antonio Stores'). Inexplicably, Neff failed to name R & S Dairy Queens, Inc., the franchisee owner and operator of the San Antonio Stores, as a defendant in this lawsuit. Neff's Complaint sought declaratory and injunctive relief under Title III of the Act, 42 U.S.C. 12101 et seq.

ADQ subsequently removed this action to the United States District Court for the Western District of Texas, San Antonio Division. Upon removal, this action was assigned to the Honorable Edward C. Prado, United States District Court Judge. Contrary to Neff's assertions, this case is not a "class action", nor does it involve any issues relating to "state-wide relief at all Dairy Queen® restaurants in Texas."[1]

---

[1] Neff unsuccessfully attempted to broaden the scope of this lawsuit beyond the two San Antonio Stores at issue on several occasions. On May 2, 1994, Neff filed a motion for class certification. On June 3, 1994, Neff filed an amended motion for class certification and a motion for leave to file an amended complaint. Judge Prado denied these motions as moot when he granted ADQ's summary judgment motion. Neff did not appeal the denial of either of these motions.

On June 14, 1994, ADQ filed a motion for summary judgment.[2] On July 14, 1994, Judge Prado granted ADQ's motion and entered final judgment dismissing Neff's claims against ADQ. Judge Prado held that the terms of the Nacogdoches franchise agreement were insufficient to make ADQ an "operator" for purposes of Title III of the Americans with Disabilities Act.[3] Specifically, Judge Prado held that merely possessing a veto power over proposed building plans and modifications does not constitute "operating" a public accommodation for purposes of the Americans with Disabilities Act. 879 F. Supp. at 60.

On August 12, 1994, Neff appealed the District Court's judgment to the Fifth Circuit Court of Appeals (the "Fifth

---

[2] Neff now disingenuously claims insufficient opportunity to conduct discovery in the case before summary judgment. However, Neff raised this issue neither in the District Court, nor on appeal to the Fifth Circuit. Moreover, the record demonstrates that Neff had sufficient time to conduct discovery. ADQ moved for summary judgment more than three months after Neff filed the case. Neff also misrepresents the significance of Judge Prado's denial of ADQ's motion to dismiss. On April 14, 1994, ADQ filed a motion to dismiss to put Neff on notice that ADQ was not a proper defendant in this action. ADQ did not submit a brief or affidavits in this initial procedural response, anticipating that the substantive issue would ultimately be determined by summary judgment. When Neff challenged ADQ's motion to dismiss, which was on file but not scheduled for hearing, Judge Prado denied ADQ's motion because of the absence of supporting affidavits and arguments, stating, however, that "the court may reconsider these rulings or consider a motion for summary judgment" upon receipt of supporting authority. (See Order, reprinted in Respondent's Appendix, A-1, A-2.)

[3] Two other federal district courts that have addressed the question of ADQ's liability for allegedly discriminatory conditions at franchisee stores have also concluded that ADQ does not "operate" the stores. See Young v. American Dairy Queen, Inc., 1994 WL 761233 (N.D. Tex. 1994); Alonzo v. Bayside Restaurant Co., C.A. No. C-94-103, slip op. at 4 (S.D. Tex. 1994).

Circuit"). The Fifth Circuit affirmed the District Court's grant of summary judgment holding that ADQ had met its summary judgment burden under Rule 56(c) and had established the absence of a genuine issue of material fact. The Fifth Circuit further held that ADQ was entitled to judgment as a matter of law based on the terms of its franchise agreements with R & S Dairy Queens. Specifically, the Court found that, as a matter of law, the unambiguous terms of the Nacogdoches franchise agreement[4] were insufficient to support a holding that ADQ "operates," the San Antonio Stores in the ordinary and natural meaning of that term. 58 F.3d at 1068-69.

II. Statement Of Facts.

A. Margo Neff.

Margo Neff is an individual who has a physical disability that requires her to use a wheelchair to gain mobility. Neff commenced this action against ADQ alleging that the San Antonio Stores are not accessible to persons with disabilities in violation of Title III of the ADA. Neff complained that ADQ was responsible for removing alleged barriers to access because ADQ "conducts or owns" the San Antonio Stores.

B. American Dairy Queen Corporation.

ADQ is the owner of the federally registered Dairy Queen® trade name and various trademarks and service marks that are used in connection with the operation of licensed

[4] Neff never identified any language in the Perrin Beitel Store's franchise agreement to support her claim that ADQ "operates" the Perrin Beitel Store. The Perrin Beitel franchise agreement contains none of the provisions to which Neff points in support of her argument regarding ADQ's alleged control over the Nacogdoches Store.

Dairy Queen® stores.[5] (See Affidavit of Lon Brew, reprinted in Respondent's Appendix, A-3 - A-9.) ADQ is also the national and international franchisor of Dairy Queen® stores. (Id.)

ADQ enters into franchise agreements with individuals or entities (franchisees) under which ADQ, in exchange for certain fees, licenses franchisees to establish and operate retail businesses under the Dairy Queen® trade name, to use the Dairy Queen® Trademarks, and to use the Dairy Queen® business system, methods, and sales promotion programs in connection with their Dairy Queen® stores. (Id.) Through its franchise system and agreements, ADQ makes available to franchisees an opportunity to establish and operate independent retail stores as part of the Dairy Queen® system. (Id.)

ADQ has consistently taken steps to educate and aid its franchisees with respect to ADA compliance. Since passage of the ADA, ADQ has been active in educating franchisees about the requirements of the ADA and encouraging franchisees to take all actions that are necessary to ensure that their stores comply with those requirements. See 58 F.3d at 1069 n.13. ADQ also has held workshops and seminars for its franchisees concerning the compliance requirements as they relate to restaurants. Contrary to Neff's representations, this case is before this Court today not because ADQ has failed to fulfill its responsibilities, but because Neff and her counsel refuse to acknowledge that ADQ does not own, lease (or lease to), or operate its franchisee's store buildings in issue[6] and has neither the legal responsibility nor legal authority to make

---

[5] Hereinafter, the phrase "Dairy Queen® Trademark" refers collectively to the "Dairy Queen®" trademark and ADQ's other trademarks and service marks.

[6] It is undisputed that ADQ neither owns nor leases either of the San Antonio Stores involved in this action. (A-8.)

physical changes to those store buildings. This case is also before the Court because Neff failed to pursue her claims against the party responsible for compliance, ADQ's franchisee, the true owner and operator of the store buildings. Indeed, if the store buildings are truly not in ADA compliance, there is no reason to believe that Neff could not have obtained compliance had she proceeded against the proper party.[7]

C. R & S Dairy Queens, Inc. And The San Antonio Stores.

The San Antonio Stores are independently owned and operated by R & S Dairy Queens, Inc. ("R & S"), a Texas corporation. It is undisputed that R & S, a franchisee of ADQ, is a separate and distinct entity from ADQ. (A-8.) It is also undisputed that R & S and ADQ have no common ownership, employees, or management and have no centralized control of labor operations. (Id.) R & S independently owns and operates the San Antonio Stores. (Id.) R & S also owns the buildings and premises from which those stores are operated.[8] (Id.) ADQ has no ownership interest in either building and does not lease either building. (Id.) Each of the San Antonio Stores is governed by a separate franchise agreement. (A-5 - A-7.)

---

[7] In Alonzo v. Bayside Restaurant Co., supra, Advocacy Incorporated, Neff's counsel, did join the franchisee and successfully negotiated a settlement without ADQ's involvement.

[8] It is also undisputed that the San Antonio Stores' buildings were constructed before passage of the ADA, and that ADQ neither built, designed, provided designs or plans for, nor otherwise participated in the construction of the San Antonio Stores' buildings. (A-6, A-7.)

REASONS FOR DENYING THE WRIT

I. The Fifth Circuit Properly Held That The Issue Of Whether ADQ Is An "Operator" Of The San Antonio Stores Is A Question Of Law In The Instant Action.

Neff contends that the District Court and the Fifth Circuit Court of Appeals ("the Lower Courts") improperly "weighed the evidence" when granting ADQ's motion for summary judgment. Neff, however, misrepresents the Lower Courts' analyses, as well as the applicable summary judgment standard.

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment:

> [S]hall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c). Numerous decisions have reiterated this standard. See, e.g., Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986).

The Lower Courts properly applied this standard to the question of whether ADQ operates the San Antonio Stores for purposes of the ADA. Neff submitted no evidence to the District Court upon which reasonable minds could return a verdict in her favor, but relied solely upon the unambiguous language of the Nacogdoches franchise agreement to support her claim that ADQ "operated" the San Antonio Stores. The

Fifth Circuit correctly held that the interpretation of an unambiguous contract is a question of law. 58 F.3d at 1065. The contract contained no indication that ADQ actually operated the San Antonio Stores, and the undisputed evidence in the record demonstrates that R & S, not ADQ, owns and operates the San Antonio Stores and is the only party legally capable of making physical changes to the San Antonio Stores' buildings.

Thus, contrary to Neff's assertions, there was no conflicting evidence to "weigh." The Lower Courts premised their analyses on undisputed facts -- the unambiguous language of the franchise agreement. The Lower Courts were not weighing factual evidence, but making a legal determination of whether a remote corporate franchisor could be deemed the "operator" of the stores solely on the basis of the undisputed evidence before them. The terms of the franchise agreement were undisputed and unambiguous. Also uncontroverted is the absence in the record of any summary judgment evidence, or even allegations, of ADQ's right to compel compliance modifications, or refusal to approve modifications to achieve compliance. Neff failed to adduce any evidence in response to ADQ's summary judgment motion or explain any inability to develop sworn summary judgment evidence in time for the hearing. Accordingly, the Lower Courts applied the proper summary judgment analysis in the instant case in holding that, as a matter of law, ADQ is not an operator of the San Antonio Stores.

II. The Fifth Circuit's Decision Does Not Conflict With Any Decisions Of Other United States Courts Of Appeal.

Neff erroneously asserts that the Fifth Circuit's decision conflicts with decisions from the Third, Eighth, and Tenth Circuit Courts of Appeals. In fact, cases cited by Neff involve

issues of vicarious liability and liability under the employment provisions of the Civil Rights Act, not the issue presently before the Court.

A. The Fifth Circuit's Decision Does Not Conflict With The Third Circuit's Decision In *Drexel.*

The Third Circuit's decision in Drexel v. Union Prescription Ctrs., Inc., 582 F.2d 781 (3rd Cir. 1978), creates no conflict with the decision in the instant case. Drexel, a wrongful death action, involved issues of alleged vicarious liability by a pharmaceutical franchisor for negligent prescription filling by its retail pharmacy. Id. The analysis in Drexel differs from the instant case in numerous respects.

First, Drexel did not involve the statutory interpretation of the term "operator" as it relates to franchisors or the ADA. Rather, Drexel dealt with classic master-servant principles of control or right to control under a tort analysis less dependent on the specific actions of the franchisor.

Second, Drexel was decided without any serious analysis of the requirements of the Lanham Act. The opinion mentioned the Act only in passing and reflected uncertainty about whether it actually required trademark owners to exercise controls over its licensees. See 582 F.2d at 786 n.5.

Third, Drexel cited ambiguities in the franchise agreement at issue and resulting questions over the extent to which the franchisor represented or "held out" the franchisee to the public as a direct employee or servant of the franchisor. No such issues are involved here. Significantly, Neff admits that the terms of the Nacogdoches franchise agreement are unambiguous. (See Petitioner's Brief, p. 11). Moreover, the instant case involved no allegations that ADQ held out its franchisee to the public as being a direct employee or servant of ADQ.

Fourth, contrary to Neff's assertions, the controls reserved by the franchisor in Drexel were far broader than those reserved by ADQ. In Drexel, the franchisor went so far as to require that the franchisee use union contractors and suppliers, and reserved the right to (i) order fixtures and equipment for the franchisee that franchisor believed were necessary, (ii) designate the nature and levels of inventory, and (iii) effect "a complete and effective transfer of the business" from the franchisee to the franchisor at the franchisor's option. 582 F.2d at 787-788.

B. The Fifth Circuit's Decision Does Not Conflict With Eighth And Tenth Circuit Decisions Concerning Civil Rights Act Remedies.

Neff incorrectly relies on Bradley v. Pizzaco of Nebraska, Inc., 7 F.3d 795 (8th Cir. 1993), and Wheeler v. Hurdman, 825 F.2d 257 (10th Cir. 1987), for the proposition that franchisors are responsible for violations of civil rights occurring at the premises of a franchisee. Neither case even addressed that issue. Instead, each turned on the existence or absence of an employer-employee relationship between the parties. Specifically, Bradley involved a corporate-wide "no beard" policy specifically established by the Domino's Pizza franchisor. The franchisor was, thus, a necessary party to the suit, and the Court did not even address the issue of whether the franchisor was liable for the acts of its franchisee. 7 F.3d at 796-97. It was the franchisor's policy, not that of the franchisee, that was under attack. Unlike Bradley, this case does not involve an ADQ-established policy alleged to violate applicable law.

Wheeler, involved no franchise issues whatsoever. Wheeler was an employment discrimination suit filed against an accounting firm. 825 F.2d at 260-62. The case was decided against the plaintiff on the basis that she was a

partner, not an employee, of the accounting firm and thus not covered under Title VII of the Civil Rights Act. In denying the plaintiff's attempt to broaden judicially the scope of Title VII beyond employees, the Court stated as follows:

> If Congress had intended the Acts to apply to the performance of all services, subject to stated exceptions, it would have said so. To suggest that Congress intended the provisions of Title VII, the ADEA, and the FLSA to reach all situations where discrimination may arise in a business setting is to suggest that it enacted these statutes with the intent that they cover all individuals having an economic relationship with a business. This would make employee status largely irrelevant and would essentially transform the employment discrimination statutes into business discrimination statutes.
>
> * * *
>
> The requirement that the statutes cover only employment situations suggests that Congress perceived a need to limit the application of these statutes.

Id. at 275-76.

Similarly, Congress carefully considered and scrutinized the issue of what specific entities should be covered under Title III of the ADA, and chose not to include franchisors among those entities. Neff's lawsuit is a misguided attempt to expand the breadth of the ADA's application beyond its plain language and the intent of Congress.

Finally, Neff's assertion that franchisors are routinely held liable for civil rights violations occurring on the premises of their franchisees is not correct. To the contrary, numerous courts have recognized that the mere establishment by a franchisor of uniform standards and specifications, which are essential to the functioning of a franchise system, does not subject the franchisor to liability under civil rights statutes for the acts of a franchisee. See, e.g., Evans v. McDonalds Corp., 936 F.2d 1087 (10th Cir. 1991); Kennedy v. McDonalds Corp., 610 F. Supp. 203 (D. W.Va. 1985).

CONCLUSION

Respondent ADQ respectfully requests that this Court deny Petitioner's request for a writ of certiorari to the Fifth Circuit Court of Appeals. There are no compelling reasons for this Court to grant Petitioner's request. The Fifth Circuit properly affirmed the District Court's grant of summary judgment holding that, as a matter of law, ADQ was not an "operator" of the two franchised Dairy Queen® restaurants at issue for the purposes of the ADA's prohibition on discrimination in public accommodations. Moreover, the Fifth Circuit's decision conflicts with no decisions of other United States Courts of Appeal, nor any decisions of this Court.

Respectfully submitted:

William L. Killion
Counsel of Record
Troy A. Bader
GRAY, PLANT, MOOTY, MOOTY & BENNETT, P.A.
3400 City Center
33 South Sixth Street
Minneapolis, Minnesota 55402
(612) 343-2800

Joseph M. Harrison IV
HAYNES AND BOONE, L.L.P.
112 East Pecan Street
Suite 1600
San Antonio, Texas 78205
(210) 978-7000

Attorneys for Respondent

November 17, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

MARGO NEFF, for Herself and those similarly situated,	)	
Plaintiff,	)	
VS.	)	CIVIL ACTION NO. SA-94-CA-280
AMERICAN DAIRY QUEEN, INC.,	)	
Defendant.	)	

ORDER DENYING MOTION TO DISMISS

On this date came on to be considered Defendant's Motion to Dismiss of American Dairy Queen Corporation, filed in the above-styled and numbered cause on April 1, 1994. After careful consideration of all the papers and pleadings on file, this Court is of the opinion that Defendant's motion should be denied.

Defendant's motion merely states without evidentiary support that Defendant does not own, operate or rent the subject premises. Defendant offers no argument or cite any authority why such unproved factual issues require dismissal for failure to state a claim. Defendant makes similar cursory allegations that Plaintiff does not meet the requirements of Rules 19 & 23 of the Federal Rules of Civil Procedure. While the Court may reconsider these rulings or consider a motion for summary judgment, the Court must receive a pleading

from Defendant that outlines the Defendant's arguments and the authority supporting Defendant's claims.[1]

Accordingly, it is hereby ORDERED that Defendant's Motion to Dismiss of American Dairy Queen Corporation is DENIED.

SIGNED and ENTERED this 6th day of May, 1994.

s/s
EDWARD C. PRADO
UNITED STATES DISTRICT JUDGE

[1] Curiously, Defendant's motion states that it includes a supporting memorandum brief. The Court could not find any supporting memorandum. Possibly Defendant merely neglected to file the supporting memorandum with its motion.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

MARGO NEFF, for Herself and Those Similarly Situated,	)	
	)	Civil Action No.
Plaintiff,	)	SA-94-CA-280
	)	
vs.	)	**AFFIDAVIT OF**
	)	**LON BREW**
AMERICAN DAIRY QUEEN CORPORATION,	)	
	)	
Defendant.	)	

STATE OF TEXAS)
) SS:
COUNTY 0F DALLAS)

I, LON BREW, having been first duly sworn under oath, hereby state the following:

1. I am an individual over the age of 21 and, unless stated otherwise, I have personal knowledge as to each of the statements set forth below.

2. I am currently employed as Vice President - Franchise Operations with American Dairy Queen Corporation ("ADQ"). In my capacity as Vice President - Franchise Operations with ADQ, I am responsible for, among other things, providing assistance and services to Dairy Queen® stores in an area that includes the State of Texas.

3. I have been employed with ADQ in a variety of positions since 1981 and have held my current position since December 1990.

4. I presently work for ADQ out of its Dallas, Texas regional office and have worked out of that regional office since 1987.

5. In my capacity as Vice President - Franchise Operations with ADQ I am aware of the Dairy Queen® stores located at 13122 Nacogdoches and 9726 Perrin Beitel in San Antonio, Texas ("San Antonio Dairy Queen® Stores"), and have access to ADQ's files relative to the San Antonio Dairy Queen® Stores.

6. ADQ is the owner of the federally registered Dairy Queen® trade name and various trademarks and service marks that are used in connection with the operation of licensed Dairy Queen® stores.

7. ADQ is also the national and international franchisor of Dairy Queen® stores.

8. ADQ enters into franchise agreements with individuals or entities, known as franchisees, under which ADQ licenses the franchisees to establish and operate retail businesses under the Dairy Queen® trade name, to use ADQ's trademarks and service marks, and to use the Dairy Queen® business system, methods, and sales promotion programs in connection with their Dairy Queen® retail stores, in exchange for certain fees. Through its franchise system and franchise agreements, ADQ makes available to franchisees a system pursuant to which they can establish and operate retail stores as part of the Dairy Queen® system.

9. ADQ protects the Dairy Queen® trade name and its trademarks and service marks by, among other things, requiring franchisees to use distinctive and approved designs, equipment, supplies, ingredients, business methods, sales promotion programs, and other uniform methods and procedures to ensure the quality and uniformity of the products and services provided to consumers through licensed Dairy Queen® stores.

10. On July 1, 1975, ADQ's predecessor in Texas, Dairy Queens Products of Texas, entered into a written agreement with Dairy Queen Investments, Inc. entitled "DAIRY QUEEN FRANCHISE AND LICENSE AGREEMENT" ("1975 Franchise Agreement"). A true and correct copy of the 1975 Franchise Agreement is attached as Exhibit A.

11. Under the 1975 Franchise Agreement, Dairy Queen Investments, Inc. received a license to use the Dairy Queen® name and Dairy Queen® Trademarks, and to open a Dairy Queen® store in a territory defined in part as all area within one half mile radius of Nacogdoches at El Sentero in San Antonio, Texas.

12. ADQ believes that in 1975 or 1976, Dairy Queen Investments, Inc. constructed or had constructed the present Dairy Queen® store building located at 13122 Nacogdoches in San Antonio, Texas.

13. ADQ acquired the franchise and license rights of Dairy Queen Products of Texas, including its rights under the 1975 Franchise Agreement, during October 1980.

14. ADQ did not build, design, provide design or plans for, or otherwise participate in the construction of the Dairy Queen® store building located at 13122 Nacogdoches in San Antonio, Texas.

15. On or about December 31, 1985, Dairy Queen Investments, Inc. subfranchised its rights under the 1975 Franchise Agreement to the Dairy Queen® store building, equipment, premises, and other assets to R & S Dairy Queens, Inc. A true and correct copy of the 1985 Subfranchise Agreement is attached as Exhibit B.

16. On September 1, 1986, ADQ entered into an updated written agreement with R & S Dairy Queens, Inc. entitled "DAIRY QUEEN OPERATING AGREEMENT" ("1986 Franchise Agreement"), which replaced the 1975 Franchise Agreement. A true and correct copy of the 1986 Franchise Agreement is attached as Exhibit C.

17. Under the 1986 Franchise Agreement, ADQ granted R & S Dairy Queens, Inc. a license to continue using the Dairy Queen® name, Dairy Queen® Trademarks, Dairy Queen® business system and sales promotion programs in connection with the Dairy Queen® store located at 13122 Nacogdoches in San Antonio, Texas for an indefinite period of time.

18. On May 18, 1971, ADQ's predecessor in Texas, Dairy Queen Products of Texas, entered into a written agreement with Ronald Schreiber entitled "DAIRY QUEEN FRANCHISE AND LICENSE AGREEMENT." ("1971 Franchise Agreement"). A true and correct copy of the 1971 Franchise Agreement is attached as Exhibit D.

19. Under the 1971 Franchise Agreement, Ronald Schreiber received a license to use the Dairy Queen® name and Dairy Queen® Trademarks, and to open a Dairy Queen® store in a territory defined as all area within one half mile radius of a Dairy Queen® store located at about 9800 Perrin Beitel in San Antonio, Texas.

20. ADQ believes that during 1972 or 1973, Ronald Schreiber designed and constructed or had constructed the present Dairy Queen® store building located at 9726 Perrin Beitel in San Antonio, Texas.

21. ADQ acquired the franchise and license rights of Dairy Queen Products of Texas, including its rights under the 1971 Franchise Agreement during October 1980.

22. ADQ did not build, design, provide design or plans for, or otherwise participate in the construction of the Dairy Queen® store building located at 9726 Perrin Beitel in San Antonio, Texas.

23. On or about June 15, 1981, Ronald Schreiber sold his rights under the 1971 Franchise Agreement and the Dairy Queen® store's building, equipment, premises, and other assets to R & S Dairy Queens, Inc. ("1981 Transfer Agreement"). A true and correct copy of the 1981 Transfer Agreement is attached as Exhibit E.

24. Under the 1981 Transfer Agreement, R & S Dairy Queens, Inc. received a license to use the Dairy Queen® name and Dairy Queen® Trademarks, and to continue to operate the Dairy Queen® store located at 9726 Perrin Beitel in San Antonio, Texas.

25. R & S Dairy Queens, Inc. is a separate and distinct entity from ADQ. R & S Dairy Queens, Inc. and ADQ have no common ownership, employees, or management, and have no centralized control of labor operations.

26. R & S Dairy Queens, Inc. has operated the Dairy Queen® store located at 13122 Nacogdoches under the 1986 Franchise Agreement since September 1, 1986.

27. R & S Dairy Queens, Inc. has operated the Dairy Queen® store located at 9726 Perrin Beitel under the 1971 Franchise Agreement since June 15, 1981.

28. The buildings and premises from which the San Antonio Dairy Queen® Stores are operated, are owned by R & S Dairy Queens, Inc. ADQ has no ownership interest in either of these buildings or premises.

29. The buildings and premises front which the San Antonio Dairy Queen® Stores are operated are not leased by R & S Dairy Queens, Inc. to ADQ or anyone else.

30. ADQ does not have access to San Antonio Dairy Queen® Stores' buildings, other than through R & S Dairy Queens, Inc.

31. ADQ does not control the day-to-day operations of either of the San Antonio Dairy Queen® Stores.

32. ADQ has no employees at either of the San Antonio Dairy Queen® Stores on a daily basis. ADQ also has no employees that prepare products, clean the store, operate cash registers, set product prices, maintain store accounting records, pay store bills, order supplies, hire or fire store

managers or employees, serve store customers, or perform any other services for R & S Dairy Queens, Inc. at either of the San Antonio Dairy Queen® Stores.

FURTHER YOUR AFFIANT SAYETH NOT.

s/s
Lon Brew

Subscribed and sworn to before me
this 8th day of June, 1994.

Michelle Kelley
Notary Public

9219u